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Supreme Court, U.S.
FILED

No. 10-985

NOV 19 2010

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In The
Supreme Court of the United States

BEN OGBODIEGWU
Petitioner,

V.

The State of Texas
Respondent,

On Petition For A Writ Of Certiorari
To The Supreme Court Of The United States

PETITION FOR A WRIT OF CERTIORARI

BEN OGBODIEGWU
1906 MATAGORDA DRIVE
ROUND ROCK, TEXAS 78664
(512) 786-7966
Pro se Petitioner

QUESTIONS PRESENTED

Ben Ogbodiegwu, the petitioner pleaded no contest in city of Austin municipal court to charges that he violated a City of Austin zoning ordinance. At the time he made this plea, he neither understood the charges nor the consequences of being convicted on these charges. However, the municipal court accepted the plea and deferred disposition for six months. Upon discovering that he has been ill advised, Ben Ogbodiegwu filed a motion to change his plea from one of "no contest" to one of "not guilty." About three months following his placement on a deferred disposition, a hearing was held and the municipal court denied the motion, revoked the deferred disposition, and convicted the petitioner of violating the city ordinance. Consequently, the city assessed a fine of two thousand dollars as a punishment in spite of the trial court's six months deferred disposition judgment. The county court at Law erroneously affirmed the decision of the municipal court and the appeals courts overlooked all the issues raised by the appeal..

The questions presented are:

1. Did the Municipal Court apply an erroneous legal standard in holding that appellant did not establish a right to a change of plea? Texas law establishes that defendant may withdraw a plea as a matter of right, without stating a reason, before the court has taken the case under advisement or pronounced judgment. Jackson v. State, 590 S.W. 2d. 514, 515 (Tex. Crim App.1979) 9 CITING Ralls v. State, 151 Tex. Crim. 146, 205 S.W. 2nd 594 (1947); Williams v. State, 191 S.W. 3d 242 (Tex. App.-Austin 2006, reh'g overruled). However, if a defendant seeks to withdraw a plea once the case is taken under advisement or once the judgment is pronounced, then the trial court maintains broad discretion in granting permission to withdraw a plea. State v.

Ellis, 976 S.W.2d 789,0792 (Tex. App-Houston [Ist Dist. 1998, no pet.0.)

2. Does the municipal court have the jurisdiction to deliberate on a case in which the appellant had pleaded "no contest"?

3. Does the municipal court have the jurisdiction to deliberate on a case that has been appealed by the petitioner?
4. Does the continuous communication of the state's counsel with the petitioner's former counsel to the absolute exclusion of the petitioner, a pro se not constitute denial of the right to a fair trial?

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901 S. W. 2d 520, 522 (Tex. – App- El- Paso 1995).

City of Dallas, Appellant, v. Paul C. WoodField, Appellee
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Thomas J.'Jim" TRULOCK, Appellant v. The City of Duncanville, Appellee 277 S. W. 3d 920 (Tex. 2009).

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445 U. S. 478, 481, 102 S. Ct. 1181, 1183 (1982).

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(App.App. 14 Dist. 1991), 816 S. W. 2d 803

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OPINIONS BELOW

Texas Court of Appeals third District, at Austin issued a memorandum opinion on February 12, 2010 while the court of Criminal Appeals of Texas rejected petitioner's motion for rehearing on September 1, 2010.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are BEN OGBODIEGWU, PETITIONER and THE STATE OF TEXAS, RESPONDENT.

JURISDICTION

The Supreme Court of the United States has jurisdiction over this case pursuant to 28 U.S.C $1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule App. Proc. Rule 44. 2 (a)

U.S. Constitution III

Tampering With or Fabricating Physical Evidence

Tex. Gov't Code 37.09

Tex. Gov't Code Ann #51.901

Tex. R. App. P. 49.1

Texas Constitution II

Court of Criminal Appeals Under Rules 68, Texas Rules Of Appellate Procedure

Tex. Jur. 3d Criminal Law #236, Effect Of Illegal Obtained or False Information

Dix. and Dawson, 40 Tex. Prac. Series 4.59. Requirement Under Articles 38. 24 that Evidence have been Obtained – in violation of Triggering Legal Requirement **In General**

Jackson v. State, 590 S.W. 2d 514, 515 (Tex. Crim. App. 1979)

(Citing Ralls v. State, 151 Tex Crim 146, 205 S.W. 2d 594 (1947)
Williams v. State, 191 S.W. 3d 242 (Tex. App Austin 2006
State v. Ellis, 976 S.W. 2d 789, 792

STATEMENT OF THE CASE

Petitioner Ben Ogbodiegwu pleaded "no contest" in municipal court to charges that he violated a City of Austin zoning ordinance. Following a hearing, the municipal court denied the motion, revoked the deferred disposition, and convicted Ogbodiegwu of violating the city ordinance. Punishment was assessed at a $2000 fine. Subsequently, the municipal court's judgment was affirmed by the county court at law and the petitioner appealed the decision to the Texas court of appeals. Upon receipt of the petitioner's appeal application, the State of Texas issued a defendant's notice of appeal which is acknowledged and accepted by the lower courts. [See the said record in the case file] While, the case is still under appeal and in good standing, the petitioner decided to resolve the issue between the City of Austin and himself by obtaining a temporary permit from the City of Austin to operate a car wash at 1711 East Cesar Chavez, Austin, Texas 78702. Since, the object of the dispute was resolved by the petitioner to the satisfaction of the respondent and the lower courts chose to ignore this condition. The petitioner states that the lower courts' decision to ignore the resolution of the case with the appellant raises the question of intent to circumvent the issue of mootness on the part of the State of Texas.

Prior to obtaining the temporary permit, the Austin Planning Commission unanimously approved a conditional land use permit for operating a car wash facility at 1711 East Cesar Chavez, Austin, Texas with a vote. On or about May 10th 2010, the State of Texas used $1500 of the $2000 the petitioner had paid for posting a cash appearance bond for settling the fine that had been assessed for the alleged ordinance violation. Though, the conversion of the bond money to a payment for the assessed fine grossly disregarded the existence of a motion that was filed on May 6, 2010. This error was

brought to the notice of the court of appeals and the court of criminal appeals respectively and they refused to acknowledge the existence of the reversible error. In spite of the fact, that the errors were corrected and the document placed in the case file the two courts of appeal refused to acknowledge that there has been a defect in their procedure [See Rule 44.3]. This inaction by the State of Texas to acknowledge a fundamental error in their proceedings raises issues of potential denial of the petitioner's right to a due process. It is worth noting that the Austin City Council on August 19, 2010, with a vote of (4-3) overturned the decision of the Austin Planning Commission and the recommendation of their staff in approving the conditional use permit. Following the council's decision, the petitioner stopped the car wash, and informed the court that he would not appeal the decision of the Austin City Council. Furthermore, the petitioner stopped the advertising of the car wash on KAZI 88.7 and a copy of the stop order was made available to the courts. Again, both courts refused to acknowledge the fact that there is no longer a live controversy between the petitioner Ben Ogbodiegwu and the respondent the State of Texas. The State of Texas in order to have jurisdiction over the case now paid the fine on a case which was under appeal and in good standing, and had met the requirements of appellate rule 68, and had a certificate of appeal, as well as, the document from the State verifying payment error and corrections thereto.

The contention of the petitioner is that the mootness doctrine is applicable in this case. The mootness doctrine stipulates that the dismissal of a cause is required when a controversy becomes moot. Also, neither the Texas Constitution nor the Texas Legislature has invested this Court with the authority to render advisory opinion. The Texas Constitution Article 11,-1; and the U.S. Constitution Article 111 limit the jurisdiction of all federal courts to "cases and controversies. The issue before the court is whether there is a live controversy or

not? An appellate court is prohibited from deciding a moot controversy by the separation of powers doctrine provided for in the state and federal constitutions. The provisions of the separation of powers doctrine prohibit courts from rendering advisory opinions. For an appellee or respondent to have standing, a controversy must exist between the parties at every stage of the legal proceedings, including the appeal. The car wash facility which was the subject of the dispute has ceased to exist and the petitioner has accepted the decision of the Austin City Council to deny the car wash permit. Therefore, a live controversy did not exist then or now. The court must vacate the judgment of the trial court and dismiss the underlying cause of action.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Review Is Warranted Because the State of Texas violated the following:
Texas Penal Code 37.09; Tex. Gov't Code Ann #51.901; Defendant's Notice of Appeal;Tex. R. App. P. 49.1; Court of Criminal Appeals under Rules 68, Texas Rules of Appellate Procedure; Due Proc; Rule of Law and Petitioner's Constitutional Rights, as evidenced by the decision of the State of Texas to willfully used the cash appearance bond money as a settlement for a fine on a case which was pending under appeal with a motion from the petitioner filed on May 6, 2010. In addition, the State of Texas violated the attorney-client privilege by contacting Mr. Willie Schmeler, ex- counsel who withdrew from the case on March 26, 2010 instead of the petitioner who is pro se. The case record confirms that the State of Texas converted the petitioner's cash appearance bond money to a settlement for a fine on a case that is on appeal on May 10, 2010 and on May 11, 2010, the petitioner was approved for a conditional use permit based on the recommendations of the Austin Planning Commission and the staff of the city of Austin. Upon notification from the petitioner of this anomaly, the State of Texas made the appropriate correction though this error is prejudicial to the appeal process.

Furthermore, a review is warranted because the State of Texas refused to accept the reversible error relating to the conversion of the cash appearance bond money as payment for a fine on a case that is on appeal. The State of Texas corrected the payment error which it later used as a basis for obtaining a judgment against the petitioner,

claiming that he was convicted and he paid the fine. The petitioner contends that he did not pay the fine and that State of Texas designed the payment error as a means of circumventing one of the fundamental questions raised by this case, which is, does it meet the standards of a moot case. In addition, the petitioner is appealing the decisions of the lower courts on the grounds that he met the requirements, has a defendant's notice of appeal, has a case that has been in good standing and under appeal while the live controversy was resolved. Therefore, according to U.S. constitution 111 and Texas Constitution 11 the judgment must be vacated and the underline cause of this case to be dismissed. Moore v. State (App. 1Dist. 1995). 907. S. W. 2d. 918; Valley Baptist Med. Ctr. v. Gonzales, 33 S. W. 3d 821, 822 (Tex.2000); Camerena v. Texas Employment Comm'n 754. S .W 2d 149, 151 (Tex. 1998); Olso v. Comm'n For Lawyer Discipline 901 S. W. 2d. 520, 522 (Tex-App-El-Paso; City of Dallas, Appellant, v. Paul C. Wood Field, Appellee 305 S. W. 3d 412 (Tex. 2000); Thomas J. "Jim" TRULOCK, Appellant v. The City of DUNCANVILLE, Appellee 277 S. W. 3d 920 (Tex. 2009); Williams v. Lara 52 S. W. 3d 171 184 (Tex. 2001); Murphy v. Hunt 455 U. S. 478, 481, 102 S. Ct. 1181 1183 (1982).

Also, the State of Texas has refused to acknowledge the mootness implicit in this case. The petitioner contends that a live controversy no longer exist between the parties involved as the petitioner did not and has not challenged the decision of the Austin City Council to deny Push Up Foundation a temporary permit to operate a car wash facility. Review is warranted because the State of Texas is in violation of attorney–client privilege and the case raises the issues of "reversible error" and "fundamental error." Mr. Willie Schmerler, the former attorney of the petitioner, filed a motion to withdraw on March 26, 2010, which was approved by the court. As a result of his withdrawal, petitioner informed the court that he would represent self on this case as a pro se litigant. The

petitioner filed numerous motions to the court which were all denied. The State of Texas continued to communicate with Mr. Schmerler who no longer represents the petitioner instead of the petitioner who is a pro se litigant on a matter very instrumental to the outcome of the case. For instance, the State of Texas sent a letter to Mr. Schmerler about the payment of the fine when there is appending motion filed by the petitioner on May 6th, 2010.

In conclusion, the State of Texas has refused to accept a reversible error which was corrected by the Austin Municipal Court though the information is on record. The fundamental error involved with this case will affect the public if this case is not reversed because of the threat to the appeal process caused by the forged and falsified evidence of the State of Texas. Haughton v. State (App. 14. Dist. 1991) 816 S. W. 2d 803; Stanford v. State (App. Dist. 200) 21. S. W. 3d 337. Please see the letter of payment signed by Ms. Lisa Munder, Deputy Clerk and Motion to withdraw by Mr. Schmerler dated March 26, 2010. In addition, the Texas Rules of Appellate Procedure 25.2(a) on Certification of Defendant's Right of Appeal states that, if the defendant is the appellant, the record must include the trial court's certification of the defendant's right of appeal. It further provides that the certification shall include a notice that the defendant has been informed of his rights concerning appeal, as well as any right to file a pro se petition for discretionary review.This notification shall be signed by the defendant, with a copy given to him. The certification should be part of the record when notice is filed, but may be added by timely amendment or supplementation under this rule or Rule 34.5 (c) (1) or Rule 37.1 or by order of the appellate court under Rule 34.5(c)(2). The appeal must be dismissed if a certification that shows the defendant has the right of appeal has not been made part of the record under these rules. It is worth noting the pro se litigant's motion for a hearing was rejected by the court of criminal appeals of Texas on September 1, 2010, while the court of appeals issued a mandate on October 22, 2010 as evidenced by official notice from court of criminal appeals of Texas and

correspondence from court of appeals, third district. See document in the appendix.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BEN OGBODIEGWU
PRO SE

1906 MATAGORDA DRIVE
ROUND ROCK, TEXAS 78664
(512) 786-7966

CASE NO. 6233380,

STATE V. BEN OGBODIEGWU IN THE MUNICIPAL COURT OF AUSTIN, TEXAS

JUDGMENT

On this, the 10th day of October, 2007, at the required time of this court, came the described cause to be heard and the Defendant appeared in person and by counsel in open court.

The defendant, having previously entered a plea of "no Contest" on March 27, 2007, and said disposition being deferred until September 26, 2007, was summoned to appear before this court and show cause why such deferred disposition should not be revoked.

The Court, after hearing the evidence and argument, and after due consideration of the same, found the Defendant guilty of the offense in the complaint in this case.

It is therefore ordered and adjudged by the court that the State of Texas, for the benefit of the City of Austin, Texas, do have and recover of the Defendant the sum of $2,000.00 as the fine assessed and costs in this case. If paid after 30 days, the total due is the sum amount plus $25.00.

Any bond previously posted by defendant will be applied to the fine.

SIGNED AND ENTERED this 14th day of October, 2008.

Judge, Municipal Court
City of Austin, Texas

App. 2

Case No. 6233380

STATE OF TEXAS V. BEN OGBODIEGWU IN THE AUSTIN MUNICIPAL COURT, TRAVIS COUNTY, TEXAS

DEFENDANT'S NOTICE OF APPEAL

COMES NOW Ben Ogbodiegwu, defendant in the above styled and numbered cause, and files this Notice of Appeal from the Austin Municipal Court Judgment rendered on the 13th day of October 2008 levied, from which judgment the said Ben Ogbodiegwu hereby gives notice of his appeal to the County Court of Travis County, Texas

Respectfully submitted,

Willie Schmerler
Texas Bar No. 17764

SCANLAN, BUCKLE & YOUNG, P.C.
602 West 11th Street
Austin, Texas 78701
Telephone 512/472-1772
Facsimile 512/478-7750
E-mail willie@shylaw.com

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I, Willie Schmerler, do hereby certify that a true and correct copy of the foregoing instrument has been served on the following named attorney(s) as indicated on this 13th day of November 2008

Pamela C. Oglesby
Assistant Austin City Attorney
P.O. Box 1546
Austin, Texas 78767
Via facsimile #512/574-1744

WILLIE SCHMERLER

No. C-1-CR-07-100041
BEN OGBODIEGWU V. THE STATE OF TEXAS
IN THE COUNTY COURT AT LAW NO.. ONE, TRAVIS COUNTY, TEXAS
OPINION AND JUDGMENT

Ben Ogbodiegwu attempts to appeal a conviction for violation of the City of Austin's zoning regulations. A court reporter's record is filed after the time for filing was extended. There has been extensive briefing. It appears that Mr. Ogbodiegwu entered a plea of "no contest" to the charge and the disposition of his case was deferred from March 26, 2007 to September 26, 2007. [C.R. 141[1]] He was ordered to post a bond, contact certain city officials and cease operating a car wash on his premises. The order of March 26, 2007 promises dire consequences if Mr. Ogbodiegwu failed to meet the conditions of his deferral" a judgment of guilty will be entered, a fine of $2,000 will be assessed", etc.

Thereafter, Appellant attempted to withdraw his plea, hearings were held and his time to comply was extended. On October 10, 2007, Judge Kenneth J. Vitucci signed an order that says, in its entirety: "Defendant's Motion to Withdraw Plea is hereby DENIED. The Deferred Disposition in this cause is hereby REVOKED.[2]" [C.R. 35] This document is indexed by the court's clerk as "Judgment." The file reveals no other document that is in any way a judgment. If a motion for a new trial was ever filed, it is not indexed and cannot be located after a frustrating search among the 191 pages of the Clerk's Record.[3] Appellant gave notice of appeal on

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[1] It continues to be impossible for the Municipal Court Clerk to number pages. Behind the titled "Dockets and Minutes" and numbered"14" there are thirteen unnumbered pages. One is left to wonder why pages cannot be numbered The document referred to here is found in the 4th and 5th unnumbered pages after page 14.

[2] The reader is on his/her own to figure out the capitalization in the order.

[3] Ordinarily, failure to file a motion for new trial would be fatal to an attempted appeal Government Code §30.00014(c)

October 19, 2007. The trial judge certified Defendant's right to appeal on November 6, 2007. Appellant has filed a brief in this court alleging that Appellant's plea was involuntary due to ineffective assistance of counsel and alleging that the trial court should have permitted Appellant to withdraw his plea. Also filed is the Reporter's record of the " Pretrial Hearing" of October 10, 2007. At the end of the hearing, Judge Vitucci announced, " the deferred disposition in this case is revoked." [R.R.46]. The only thing missing from this file is a judgment of conviction. The mere revocation of a deferral period is not a judgment. A judgment in a municipal court must recite that the defendant is guilty of some offense and " that the defendant pay the amount of the fine and costs to the state." Code of Criminal Procedure Art. 45.041. Without a judgment, there is no conviction. Without a conviction, there is nothing to appeal. This case will be reversed for want of jurisdiction. It is therefore ORDERED, ADJUDGED AND DECREED that this appeal is dismissed for want of jurisdiction this 23rd day of September, 2008.

(Signed)

J. David Phillips
Presiding Judge

App. 6

NO. C-4-CR-08-100115

BEN OGBODIEGWU $ IN THE COUNTY COURT
V. $ AT LAW NO ONE
THE STATE OF TEXAS $ TRAVIS COUNTY, TEXAS

OPINION AND JUDGMENT

Ben Ogbodiegwu appeals his conviction of a violation of the City of Austin's zoning ordinances. This case previously appeared before this court under Cause Number C-1-CR-07-100041 but was dismissed for want of jurisdiction because there was not a final judgment from which to appeal. Finally, on October 14, 2008, a judgment of conviction was signed (CR 87). This appeal followed. This case began in December, 2005 with the filing of a misdemeanor complaint in the Municipal Court of Record of the City of Austin. The complaint alleges, simply put, that Mr. Ogbodiegwu operated a car wash without a conditional use permit in a zoning district where car washes are prohibited. After a long and convoluted history, with many continuances and settings and resetting[1] for trial and pretrial, on March 26, 2007, Mr. Ogbodiegwu entered a plea of "no contest", further proceedings were deferred for six months and Mr. Ogbodiegwu was given a series of conditions to meet to secure a dismissal of the criminal charge under the authority of Article 45-05J, Texas Code of Criminal Procedure (CR 56). This deferral of final disposition was terminated when the trial judge entered the finding of guilty and judgment of conviction on October 14, 2008.

Now Mr. Ogbodiegwu, as Appellant, complains that the trial judge erred when the judge refused to allow him to withdraw his plea and that his attorney was no ineffective as to render his plea of

[1] There appear to have been 12 settings from the filing of the compliant in December,2005, until the plea was made on March 26, 2007.

"no contest" involuntary. He cites to Chapter 42 of the Texas Code of Criminal Procedure for a reference point for when a case is "taken under advisement" and for rules regarding admonishment and presentence investigations.

Chapter 42 [1] has no application to a crime punishable by fine only[2]. The confusion seems to stem from the definitions section of Article 42 12[3] which defines "Court" as "a court of record having original criminal jurisdiction." This language remains unchanged since its enactment in 1965 when the 59th Legislature of the State of Texas promulgated the "new" Code of Criminal Procedure[4], Since that time, and undreamed of by authors of the 1965 Code of Criminal Procedure, Municipal Courts of a good many cities in Texas, both large and small, have become Municipal Courts of Record[5]. Arguably, the provisions of 42.12 would apply to those courts as each of them is now a "court of record".

The legislature resisted giving the judges of Municipal Courts any authority to grant "probation" of any kind until the passage of then-Article 45.54 of the Texas Code of Criminal Procedure in 1981[6]. Until the effective date of Article 45.54[7], there was no provision in

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[1] More specifically, Article 42.12, the "community supervision " statute.

[2] With the exception of Article 42.111, which authorizes deferral of proceedings in fine-only cases appealed to County Court.

[3] Section2.

[4] Acts 1965, 59th Leg., vol,2, p.317 Ch 722. At that time Article 42.12 was called the "Adult Probation and Parole Law. Its misdemeanor analog, Article 42.13, was known as the " Misdemeanor Probation Law." It defined "court" as a county court, or a county court at law or county criminal court or any court with original criminal jurisdiction...."

[5] See, generally, Chapter 30 of the Texas Government Code.

[6] The author of this opinion wrote Article 45.54 in 1981 and nursed it through the legislative process.

[7] September 1,1981.

our statutes for probation of any kind is Class C misdemeanors. A conviction for theft of a piece of bubble gum remained on one's record as a crime of moral turpitude for life. That state of the law was the impetus for the passage of then-Article 45.54, Texas Code of Criminal Procedure. That statute applies specifically to fine-only offenses like the one at issue in the case at bar. The statute as passed in 1981 began "Upon conviction of the defendant of a misdemeanor punishable by fine only[1].... The current statute begins "On a plea of guilty or nolo contendere by a defendant or on a finding of guilt in a misdemeanor case punishable by fine only[2]... It is clear that the law applicable to Class C misdemeanors, all crimes punishable by fine, only, and to the defendant before us, is Article 45.051, not Article 42.12. Therefore, Article 42.12 can offer us little guidance on the withdrawal of a plea. A defendant may withdraw his plea of "guilty" or "no contest" as a matter of right at any time before the judge takes the case under advisement or pronounces judgment. Milligan v. State, 324 S.W.2d 864 (Tex Crim.Aapp.1959) It is clear that in the case a bar, a deal was struck, the plea was entered, an order was signed deferring the case for 6 months and the case was taken under "advisement" by the judge. There is therefore no right to withdraw the plea. The judge's refusal to allow the appellant to withdraw his plea is to be reviewed under an abuse of discretion standard. McWherter v State, 57l.S.W.2d312. Here, the plea was the result of an agreement reached after the case had been pending for 15 months and had been set for trial and continued, at the request of one side or the other, 12 times or more[3]. Appellant was on at least his second lawyer at

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[1] Acts1981,67th Leg., p 894, ch318. Legislative Reference Library accessed May 27, 2009 at http://www.las.lrl.state.tx.us/LASDOC/67R/HB1657/HB165767R.pdf

[2] Article 45.051 (a), Texas Code of Criminal Procedure. Statutes are now wordier, if not better.

[3] According to timeline developed by Grady Williamson, staff attorney, the case was continued from trial settings in May,2005; June, July and August of 2006. A trial setting of September 5, 2006 was vacated by a judge. A September 13, 2006 trial date was reset to October 11, 2006 after defense counsel requested a" plea bargain setting". Pretrial settings in

the time that he, with counsel, entered his plea. It was three months into his period of deferral that he asked to be permitted to withdraw his plea. Apparently his desire to withdraw his plea is motivated, at least in part, by the fact that additional criminal charges were lodged against him alleging the same or similar offenses. Under these facts, it cannot be said that it was an abuse of discretion for the judge to refuse to permit Appellant to withdraw his plea. See, Jackson v. State, 590 S.W.2d514 (Tex.Crim.App.1979). Appellant's second point of error is that his plea was involuntary because of the ineffectiveness of his retained counsel. He testified that he had a disagreement with his retained counsel and that he appeared in court with new counsel 3 days before a trial date, his motion for continuance was denied and he decided to enter a plea agreement out of fear of going to trial with no defense (RR 8-17, generally). He discovered later that he had an affirmative defense. (RR 8). That is what motivated him to apply to withdraw his plea. (RR 10). The trial court's record tells a slightly different story. Appellant's case was set to be tried before a jury on March 2, 2007[1]. (CR 43) Appellant testified that his disagreement with his counsel that led to his discharging counsel was on February 27, 2007. (RR9) On February 28, 2007, Appellant filed a motion for continuance asking for time to find new counsel (CR 47). His fired counsel filed a motion that was never file-marked by the clerk (CR48). In any event, on March 2, 2007 – the date that the trial was scheduled to commence – a motion for continuance was granted. (CR 48) A

October, 2 settings in November and one in December, 2006 were all reset on the defendant's motions.

[1] Apparently after much negotiation and communication among attorneys and witnesses. See CR 44A, 44B, 44C and 44D.

bail bond appears at page 50 of the Clerk's Record. Apparently the trial judge granted a motion for continuance but required the posting of an appearance bond[1]. The case was then set for trial on March 26, 2007. (CR 51). Despite being notified of a trial date, Appellant did not hire replacement counsel until March 21, 2007 (CR 54A[2]). New counsel immediately faxed a motion for continuance asking for time to discuss a plea agreement with the prosecutor and prepare for trial (CR 54A). Although
Appellant hints that this motion was denied, (RR 10) the court's file is unclear about whether there was ever a hearing on the motion. An order granting the motion, prepared by the trial court, dated March 22, 2007 appears in the record but it is unsigned[3]. (CR 55). In any event, the plea was entered and the case deferred by order signed on March 26, 2007, the day that the trial was to have occurred.

Appellant claims that, because he was not aware that he had an affirmative defense to the criminal charge, his plea was not voluntary; because his counsel had not informed him of his defense, his counsel's representation fell below an acceptable standard. Appellant posits a defense that he was "grandfathered" because of the "East Austin overlay" and therefore had a "legal non-conforming use" defense available. Ordinarily, the appellate court must make a threshold determination that trial counsel erroneously and

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[1] Which does not seem unreasonable given the court's difficulty in getting the defendant to go to trial.

[2] Curiously, confronted with multi-page document, the Clerk of Austin Municipal Court numbers it, e.g., page 54A, page 54B, etc. One is left to wonder what is wrong with "54, 55, 56,....."

[3] It is somewhat tempting to rule that a lawyer who doesn't know whether his motion for continuance was granted is ipso facto not rendering effective assistance of counsel as is suggested by appellant's counsel on appeal. But it is not clear from the papers and the test of ineffectiveness is seldom that simple.

incompetently advised the appellant. Fimberg v. State 922 S.W.2d 205 (Tex.App.-Houston (1 Dist.). 1996) Here, however, this court is left to wonder how defense counsel informed the prosecution of the existence of a defense without mentioning it to the accused! For, indeed, the Appellant is complaining that his counsel (at the time Appellant entered his plea) was not aware of the defense that his previous counsel outlined in a letter to the prosecution on May 31, 2005. (CR 66C). Which does not seem unreasonable given the court's difficulty in getting the defendant to go to trial

Curiously, confronted with a multi-page document, the Clerk of the Austin Municipal Court numbers it, e.g., page 54A, Page 54B, etc. One is left to wonder what is wrong the "54, 55, 56,..." Counsel at the time of the plea was only made aware of the existence of the defense in time to file his Motion for Leave to Withdraw Plea on June 28, 2007. It is nonsensical to say that counsel is ineffective because he did not raise a defense when the same defense was raised in written communication with the prosecution more than two years prior to the plea. In any event, Appellant has some heavy lifting to do to explain that his previous counsel never told him of the defense that was proposed to exonerate him, while, at the same time writing a letter to the prosecutor about the same said defense.

In fact, after pages and pages of examination on the subject of Appellant's knowledge before he entered his plea, we arrive at this questioning by Appellant's own counsel.

Q:.....just identify, what that document is?

A: Yes. It is a document from my former legal counsel, Kelly MacDonald, dated May 31, 2005.

Q: And, on the – if you go past the signature page, there is a reference to do with copy or cc. Now were you a recipient of that letter?

A: Yes, sir. (RR 31)

Incredibly, the State objected to the admission of this letter into evidence. But, we have enough

information to know that this is the letter referred to in the Motion for Leave to Withdraw the Plea which letter contains the defense that counsel at the time of the plea did not raise. This evidence establishes clearly that Appellant was aware of the defense almost two years before he signed a plea agreement and waived the defense. It is clear that there was a disagreement between Appellant and his lawyers about whether the defense was, indeed, available to Appellant. Appellant chooses to characterize this disagreement as his lawyers lying to him. But the important takeaway here is that the Appellant knew of the existence of this putative defense long before he waived it and entered into his plea agreement.

The cases cited by Appellant in his brief all are concerned with counsel failing to inform client of options; of counsel failing to make objections; of counsel not knowing the law applicable to his case. In the case at bar, we have the Appellant knowing of a defense that he never, apparently, bothered to mention to his new counsel. It appears he knew the import of his defense, he actually had a disagreement with previous counsel about the applicability of the defense. Instead of insisting that his new counsel raise the defense. Appellant simply kept his mouth shut and entered into a plea agreement to avoid the possibility of a criminal conviction.

Q: Did your counsel provide you any advice as to what defense you might have to the claims that were brought against you?

A: Yes, previously, you know...

Q: Strike that question. Did Jeff Howard – (counsel at the time of the plea)

A: No

Q: Did Mr. Howard later come to realize that there was a defense to the claims that were brought against you?

A: Correct. (RR10)

The role of counsel and client are reversed in this case. The client had knowledge from his

previous counsel that he cannot accuse his later counsel of neglecting to pass on to him. Part of the test of whether a plea is involuntary due to ineffective assistance of counsel is to find that but for counsel's erroneous advice, the defendant would not have pled guilty and would instead have gone to trial. Strickland v. Washington, 466 U.S. 668(1983). Here, truly, counsel's advice seems not to have influenced Appellant in any way whatsoever. His point of error is overruled.

It is therefore ORDERED, ADJUDGED AND DECREED that the judgment of the Austin Municipal Court is affirmed this 2d day of July, 2009.

_____

J. David Phillips
Presiding Judge

App . 14

NUMBER C-1-CR-08-100115

BEN OGBODIEGWU VS . THE STATE OF TEXAS
APPEAL FROM THE CITY OF AUSTIN MUNICIPAL COURT BEFORE J. DAVID PHILLIPS
AFFIRMED

THIS CAUSE Came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this court that there was no error in judgment: IT IS ORDERED , ADJUDGED AND DECREED by the court that the judgment be in all things affirmed ;that the appellant pay all costs relating to this appeal ; and that this decision be certified below for observance .

NO. C-1-CR-08-100115

Ben Ogbodiegwu , Appellant

vs.

The State of Texas , Appellee
IN THE COUNTY COURT AT LAW # 1, TRAVIS COUNTY, TEXAS

DEFENDANTS NOTICE OF APPEAL

COMES NOW Ben Ogbodiegwu , appellant in the above styled and numbered cause , and files this Notice of Appeal from the *judgment* rendered on the 2nd day of july 2009 affirming the judgment of the Municipal Court of Austin , Texas on an allegation of zoning violation : prohibited use , and a fine of $ 2, 000 levied . Ben Ogbodiegwu hereby gives notice of his appeal to the Third Court of Appeals

Respectfully submitted,

Willie Schmerler
Texas Bar No. 177664700

SCANLAN , BUCKLE & YOUNG P.C.

602 West, 11th Street ,Austin, Texas 78701
Telephone 512-472-1772,Facsimile 512-478-7750Email: willie@sbylaw.com

ATTOURNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I , Willie Shmerler, do hereby certify that a true and correct copy of the foregoing instrument has been served on the following named attorney(s) as indicated on this 22nd day of July 2009:

Pamela C. Oglesby
Assistant Austin City Attorney
P.O. Box 1546
Austin, Texas 78767
Via facsimile # 512-*974-1244*

Willie Shmerler

NO. C-1-CR-08-206754

The State of Texas VS. BEN OGBODIEGWU IN THE COUNTY COURT AT LAW NO. 1, TRAVIS COUNTY TEXAS.

NOTICE OF APPEAL

On this, the 22nd day of **JULY,** 2009, the defendant in the above styled and numbered cause. Written in notice, by attorney/defendant Hereby excepts to the judgment of the court in said cause and gives Notice of Appeal to the Court of Appeals Third District of Texas.

Willie Shmerler
Attorney for defendant
State Bar NO.17764700

Complete the following: **OCTOBER 14, 2008**

-Date of judgment or other ordered appeal from : **OCTOBER 14, 2008**

-Date motion for new trial filed: : **N/A**

-Name of Trial Court Judge: : **J. DAVID PHILLIPS**

-Name of Court Reporter:
AUSTIN MUNICIPAL COURT-FEDDIE CARLIN-WELLS

-Name and address of Defense attorney on appeal:
WILLIE SHMERLER
602 WEST 11TH STREET
AUSTIN TX, 78701

-Name and address of attorney for the State on Appeal:

314 W.11TH STREET
AUSTIN TX,78701

-Defendant incarcerated?: **NO**
-Appeal Bond: **$ N/A** Date: **N/A**
-Offence: **CITY ORDINANCE VIOLATION**

-Punishment Assessed: **OPINION AFFIRMED**

CERTIFICATE Of SERVICE

I , Willie Shmerler , do hereby certify that a true and correct copy of the foregoing instrument has been served on the following named attorney(s) and as indicated on this 22nd day of July 2009 :

Pamela C. Oglesby
Assistant Austin City Attorney
P.O. Box 1546
Austin, Texas 78767
Via facsimile # 512-974-1244

WILLIE SHMERLER

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-09-00443-CR

Ben Ogbodiegwu , Appellant

vs.

The State of Texas, Appellee

MEMORANDUM OPINION

Appellant Ben Ogbodiegwu pleaded no contest in municipal court to charges that he violated a City of Austin zoning ordinance. The municipal court accepted his plea and deferred disposition for six months. Three months after he was placed on deferred disposition, Ogbodiegwu filed a motion to withdraw his plea. Fallowing a hearing, the municipal court denied the motion, revoked the deferred disposition, and convicted Ogbodiegwu of violating the city ordinance. Punishment was assessed at a $2,000 fine. The municipal courts judgment was affirmed by the county court at law. In two issues on appeal, Ogbodieigwu asserts that the trial court erred by not allowing him to withdrawal his plea and his plea was involuntary due to ineffective assistance of counsel. We will affirm the judgment.

BACKROUND

Ogbodiegwu is the Executive Director of Push – Up Foundations , a non-profit organization in Austin . All the hearing on the motion to withdraw his plea , Ogbodiegwu testified that the organization " provides transitional housing , sometimes abuse treatment services , and job opportunities for the homeless persons and individuals coming out of jails and prisons . " In 1998 , the organization began operating a residential treating facility located at 1711 East Cesar Chavez . in 1999 , the organization also began regularly operating at car wash at this location in order to raise money. According to Ogbodiegwu, the car wash operated 5 days a week , from Tuesday through Saturday[1] .

Ogbodiegwu testified that he first heard of any complaint of the City of Austin (City) regarding the car wash in 2005, when he received a violation notice from the Citys Code Enforcement section . Nevertheles , he continued operating the carwash . In April 2006 , the City filed formal charges against Ogbodiegwu in Austin municipal court . The complaint alleged that Ogbodiegwu knowingly conducted a use, to wit: operating a car wash without obtaining a conditional use permit , in a zoning district which prohibited said use , contrary to provisions in the Code of the City of Austin . This cause was set for hearing in the municipal court on May 10 , 2006.

On May 9, 2006 ,Ogbodiegwu , represented by counsel , filed what would be the first of several motions for continuance . Subsequent motions for continuance were filed in August 2006 , November 2006, and February 2007 motion , filed pro se ,

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[1] There was no evidence presented at the hearing elaborating on the nature of the car wash. However, during closing argument, defense counsel referred to it as a "water and bucket" and " hand-wash" operation, not a coin-operated or automated car wash.

Ogbodiegwu represented that he and his counsel were in disagreement as to how to conduct the trial and he needed time to hire a new attorney . Counsel moved to withdraw from the case , and the municipal court granted the motion .

The cause was set for jury trial on March 26, 2007. On March 21, Ogbodiegwu had retained new counsel. At that time counsel filed a motion for continuance . In the motion, counsel represented that he " would like a further opportunity to discuss the case with the prosecutor about the possibility of reaching an agreement and avoiding trial . " In addition " counsel stated , " the recent hiring of counsel for defendant means there is insufficient time in which to adequately prepare for trial "

The municipal court entered an order granting the motion for continuance on March 22. Nevertheless it is undisputed that Ogbodiegwu and his counsel proceeded to court as originally scheduled and that Ogbodiegwu pleaded no contest to the charges. The municipal court accepted the plea and entered an order deferring disposition for six months until September 2007. Among other terms, the order required Ogbodiegwu within 30 days , to

[C]ease operating and/or advertising a car wash on the property and/or cease allowing any and all car wash operations, advertising, development or activity to occur or be conducted on the property without first bringing the property into full compliance with any and all applicable provisions of Title 25 of the Austin City code, 2003, as amended, including a conditional use permit of fully approved and released site plan and certificate of occupancy for such use at/of said property. No such use may occur until all necessary permits have been submitted and approved and released by the city in accordance with any and all applicable zoning, site plan, building, and conditional use permit requirements of Title 25 of the Austin City code, 2003, as amended...

The order provided that if Ogbodiegwu did not comply with the above conditions, a judgment of guilt would be entered and a fine of $ 2,000.00 would be assessed. The order also contained the following statement below which appears Ogbodiegwu's signature:

PLEA OF NO CONTEST: I hereby plead no contest to the offence charged , waive my right to trial by jury , and agree to the conditions stated above. I understand my failure to comply with any of the above terms will constitute grounds for the court to find me guilty and impose the fine assessed.

Three months later on June 28, 2007 Ogbodiegwu filed a motion for leave to withdraw his plea. In the motion, counsel asserted the following:

Counsel for the defendant had insufficient time to prepare for trial, and the City of Austin (as prosecuting entity) . . . refused to agree to a continuance of the trial . Counsel for defendant was unable to obtain a hearing on continuance until the morning of the trial, immediately prior to trial, with no assurance that a continuance would be granted . defendant was not aware of any legal defenses to the charge at issue at the time and counsel for the defendant had an inadequate time to determine such defenses . Based on these circumstances, Defendant plead(ed) nolo contender and entered into the order

Counsel also argued that since the plea had been entered , he had learned of a defense to the City's charge against Ogbodiegwu , namely that the carwash was a " legal , non conforming use " permitted under the code. Counsel then proceeded to argue in detail the merits of this alleges defense . He claimed that this defense " was raised to the City in a letter dated May 31 , 2005 From defendant's prior counsel , " approximately eleven months before charges were filed against Ogbodiegwu[1]. Ogbodiegwu offered this letter into evidence during the hearing. However, the City objected to its admission, and the municipal court did not admit it into evidence. City, According to counsel N had explained to prop counsel had apparently accepted the City's explanation . However , in the view of counsel who was now representing Ogbodiegwu , the defense applied to Ogbodiegwu and entitled his client to relief . Therefore , counsel argued , Ogbodiegwu " is in compliance with the code, " " should be allowed to withdraw [his] plea of nolo contendere and plead not guilty and this case should be dismissed "

A hearing on the motion was held on October 10, 2007[2]. The only witness to testify at the hearing was Ogbodiegwu. After briefly discussing the nature of his organization, Ogbodiegwu testified about the circumstances surrounding the termination of his first counsel. He stated that

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[1] Ogbodiegwu offered this letter into evidence during the hearing. However, the City objected to its admission, and the municipal court did not admit it into evidence.

[2] Prior to the hearing, in August 2007, Ogbodiegwu's counsel filed a motion to withdraw as attorney of record and to substitute new counsel. The municipal court granted the motion. Counsel on appeal is the same counsel who represented Ogbodiegwu at the hearing on the motion to withdraw the plea.

during a meeting with his attorneys on February 27, "some serious issues of trust came up." He also expressed frustration with the amount of money that he had allegedly spent thus far trying to bring the car wash operation into compliance with the code- approximately 35,000 for " site pan work " according to Ogbodiegwu. He concluded, " I felt like I was not well represented , so I relieved them of their duties " Ogbodiegwu testified that he then hired new counsel while aware that a jury was only three days away . When asked how much communication he had with counsel before he signed the order deferring disposition , Ogbodiegwu testified " not much "when asked to clarify what that meant , he stated ," About a day " According to Ogbodiegwu , up to the point when he

Had entered his plea, he was not advised by counsel that he had a defense. The following testimony was elicited:

Q: Did your attorney, {counsel during the plea bargain}, give you a choice, or advise you as far as choices available, on a plea agreement?

A: Not much.

Q: Did he advise you as to any defenses that you had?

A: No, there was no defense available because my previous attorney had already declined any defense that we had, making me believe that the defense was through . . . . So, my attorney misled me, and he lied to me . At that particular time, I didn't want anything to be on my record. Ogbodiegwu when clarified that it was his first counsel who had " misled "him , not counsel during the plea bargain.

During cross examination, Ogbodiegwu admitted that counsel had informed him that he did not have to sign the deferral agreement and that he had read the agreement before signing it. However, he claimed that there was "something stressing" him at the time he had entered into the

agreement. He explained, " one is, I have been in this country for twenty-five years , and I have never had any criminal record , and the result is , if I don't do that , I am going to have a criminal record for providing services to the community. So, I went with that"

Ogbodiegwu further admitted that , although he has stopped operating the car wash for approximately two months after he had entered into the plea agreement , he had resumed operating the car wash at some point during the summer months of 2007 , he did so , he claimed ,

Because his then-counsel had advised him that if he did not operate the car wash for a period of longer than ninety days , the car wash would lose its status as a " legal , non conforming use "

Finally, Ogbodiegwu testified that since he had resumed operating the car wash, the City had maintained its position that the car wash was illegal. In fact, according to Ogbodiegwu , after he had filed his motion to withdraw plea , a new complaint had been filed against him.

After hearing argument from counsel, the municipal court denied Ogbodiegwu's motion , revoked the deferred disposition , found him guilty , and assessed a $ 2,000 fine. A written judgment was entered October 14 , 2008 . After the municipal court denied his motion for new trial, Ogbodiegwu appealed to the County Court at Law No. 1 of Travis County in an opinion and judgment signed on July 2, 2009, the county court at law affirmed the municipal court's judgment. This appeal followed:

ANALYSIS

Voluntariness of plea

We first address Ogbodiegwu's second issue, in which he asserts that he entered his plea involuntarily due to ineffective assistance of counsel. An involuntary plea must be set aside and

the trial court reversibly errs when it fails to do so . See Boykin v. Alabama, 395 U.S. 238, 244 (1969):Williams v. state,522 S. w.....2d 483 , 485 (Tex Crim. App.1975).

When a Defendant challenges the voluntariness of a plea entered upon the advice of counsel , contending that his counsel was ineffective , the voluntariness of the plea depends on (1) whether counsels advise was within range of competence demanded of attorneys in criminal cases and if not , (2) whether there is a reasonable probability that , but for counsels errors

He would have pleaded not guilty and would have insisted on going to trial . ex Parte Morrow , 952 S.W.2d 530 , 536 (Tex.Crim.App. 1997 ((Citing Hill v. Lockhart , 474 U.S. 52 (1985): Strickland v. Washington , 466 U.S. 668 (1984): and McMann v. Richardson , 397 U.S. 759 (1970). As with other types of ineffective assistance of counsel claims , appellant has the burden to show by a preponderance of the evidence that counsels performance fell below an objective standard of reasonableness and that appellant would , with a reasonable probability , have plead not guilty and insisted on going to trial had been properly advised. See Ex parte moody, 991 S.W.2d 856 , 858 (Tex. Crim. App. 1999). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness . Thomson v. State, 9 S.W.3d 808, 814 (Tex. Crim. App 1999)

Ogbodiegwu claims that counsel was deficient in two ways . First, he claims that his first counsel was deficient because the attorneys " misled" and " misinformed " him about how to bring the car wash into compliance with code. Second, he claims that his counsel during the plea bargain was deficient because he did not inform him of any defenses to the charge. We cannot determine the validity of these claims based on the record before us. The

only witness to testify at the hearing was Ogbodiegwu, and he presented no evidence other then his uncorroborated testimony that prior counsel " misled " and " lied " to him and that his other counsel failed to adequately advise him. The municipal court, as fact-finder, was able to evaluate Ogbodiegwu's credibility, and it would not have abused its discretion in disbelieving this testimony. See Fimberg v. State , 922 S.W.2d 205,208 (Tex.app.-Houston (1st Dist.) 1996, pet, ref;d): see also Dusenberry v. State ,915 S.W.2d 947 , 949 (Tex. App-Houston [1st Dist.) 1996, pet, ref'd) ("the Court may consider the interest and bias of any witness and is not required to accept as true the testimony of the accused or any defense witness simply because it was uncontradicted.). "There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." Thompson , 9 S.W.3d at 813. A defendants claim that he was misinformed by counsel , standing alone , is not enough to overcome that presumption. See Fimberg , 922 S.W.2nd at 208 (explaining that in cases in which guilty plea has been held to be involuntary , record contains confirmation of misinformation by counsel , or documents augmenting defendant's testimony that reveal misinformation and show its conveyance to defendant) . None of Ogbodiegwu's attorneys testified st the hearing or submitted affidavits , nor was any other evidence of their conduct admitted . We cannot conclude on this record that counsel's performance was deficient. See Labib v. State, 239 S.W.3d 322, 335 (Tex.App.-Houston [1st Dist] 2007 , no pet.) (explaining that when record does not show what kind of investigation into law and facts counsel conducted , record is inadequate to determine effectiveness of counsel .

Because Ogbodiegwu has not shown, by a preponderance of the evidence, that counsel's

performance fell below an objective standard reasonableness, we need not reach the second prong of the St ıckland test. See Labib , 239 S.W.3d at 335 . We cannot conclude on this record that Ogbodiegwu's plea was involuntary due to ineffectiveness of counsel.

Nor is there any indication in the record that Ogbodiegwu's plea was involuntary for any other reason. The standard of review when appellant contends that his pleas was not knowingly and voluntarily given is whether the record discloses that the defendant's plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant . See

North Carolina v. Alford , 400 U.S. 25 ,31 (1970): Brown v.s State , 896S.W.2nd Tex. App.-Houston [1st Dist.] 1995 , pet. Ref'd). Ogbodiegwu testified that he was informed of and understood the terms of the agreement , including that he had to cease operating the car wash : that he had read the order before sıgning it : and that he knew he was not required to sign the agreement . Additionally, he testified that he pleaded no contest because he wanted to avoid a criminal record , which may have happened had he insısted on going to trial. Thus , the record discloses that Ogbodiegwus plea , presented a voluntary and intelligent choice among the alternative courses of actıon open to him.

Finally , Ogbodiegwu emphasizes the fact that he was not admonished prior to entering his plea. See tex. Code.
Crim. Pro. Ann. Art. 26.13(a) (West Supp.2009) (listing admonishments court is required to give in felony prosecutions in whıch defendant pleads guilty or nolo contendere). However, it is well-settled that no admonitions are required in misdemeanor cases. See Gutıerrez v. State, 108 S. W. 3d 304, 309 (Tex. Crim.App. 2003); Empy v. State, 571 S. W. 2d 526, 529-30 (Tex. Crim. App.1978); Johnson v. State, 39 Tex. Crim. 625, 48

S.W. 70 (1898); see also Tex. Code Crim. Proc. Ann. Art 27.14(b) (West Supp. 2009) (explaining that in misdemeanor cases for which maximum possible punishment is by fine only, defendant need not even appear in court to plead guilty or no contest and may deliver plea to court by mail). We cannot conclude on this record that Ogbodiegwu's plea was involuntary. We overrule Ogbodiegwu's second issue.

MOTION TO WITHDRAW

In his first issue, Ogbodiegwu asserts that the municipal court erred in denying his motion to withdraw his plea. A defendant may withdraw his plea as a matter of right, without assigning a reason, until judgment is pronounced or the case is taken under advisement by the trial court. Jackson v. State, 590 S.W. 2d 514, 515 (Tex. Crim App. 1979); jagaroo v. State 180 S. W.3d 793, 802 (Tex. App. Houston [14th Dist] 2005, pet. Ref'd). If, on the other hand, the defendant decides to withdraw his plea after the trial court has taken the case under advisement or pronounced judgment, the withdraw such plea is within the sound discretion of the trial court. Jackson, 590 S.W. 2d at 515; Jagaroo, 180 S.W. 3d at 802.

As a general rule, a deferred-adjudication case is considered to have taken under advisement once a plea has been entered, both sides have presented evidence, and the trial court has accepted pleas, deferred adjudication, and placed the defendant on community supervision. Labib, 239 S.W. 3d at 331[1].

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[1] Proceedings in municipal and justice courts are governed by charter 45 of the code of criminal procedure. See Tex. Code Crim. Proc Ann. Art 45.002 (West 2006) If chapter 45 does not provide a rule of procedure governing any aspect of a case, courts are to apply the other general provisions of the code of criminal procedure to the extent necessary to achieve the objectives of chapter 45. See id. There is no procedure in the chapter 45 governing when a case is taken "under

Additionally, in some cases, the trial court must first pass the case for presentence investigation. See Houston v. State, 150 S.W. 201 S.W. 3d 212, 218 (Tex. App. Austin 2004, no pet.). Ogbodiegwu argues that because the municipal court did not pass his case for a presentence investigation pursuant to the community supervision statute, see Tex. Code Crim. Proc. Ann.
Art. 42.12 $ 9 (West Supp. 2009), the case was not taken advisement at the time he filed his motion to withdraw. We disagree.
Article 42.12 requires that presentence investigations be conducted in misdemeanor cases, "unless the defendant requests that a report not be made and the judge agrees to the request; or (2) the judge finds that there is sufficient information in the record to permit the meaningful exercise of sentencing discretion and the judge explains this finding on the record." See id art.42.12 $9(b). However, article 42.12 does not govern deferred adjudication proceedings in justice and municipal courts. Instead, these proceedings are governed by article 45.051. See id. Art. 45.051(a) (West Supp.2009); see also id. Art.45.002 (West2006) ("Criminal proceedings in the justice and municipal courts shall be conducted in accordance with this chapter.") including any other rules of procedure specifically made applicable to those proceedings by this chapter. "). There is no requirement in article 45.051 that a presentence investigation be conducted in cases brought before the municipal court. Therefore, in this particular case, the absence of a presentence investigation has no bearing on whether the case was taken under advisement.
Here, it is under disputed that Ogbodiegwu entered his plea, the municipal court accepted the plea,

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advisement' in municipal court. We are aware of no authority holding that the procedure is different in municipal court than it is in other criminal courts, nor do the parties cite to any such authority

deferred an adjudication of guilt, and placed Ogbodiegwu on deferred disposition, which is the municipal court equivalent of community supervision. See id. Art. 45.051. As no presentence investigation was required, there was nothing more for the municipal court to do at that time. Furthermore, the order of deferred disposition expressly states, "Disposition of this case is hereby deferred from 03\26\2007 until09/26/2007." Ogbodiegwu filed his motion to withdraw his plea in June 2007. thus, we conclude that his case had been under advisement at the time Ogbodiegwu filed the motion to withdraw his plea. Accordingly, we review the municipal court's ruling for abuse of discretion. See Jackson, 590 S. W. 2d. at 515; Labib, 239 S. W. 3d at 331.

A trial court abuses its discretion when it acts arbitrarily or unreasonably, or without reference to any guiding rules and principles. Montgomery v. State 810 S. W. 2d 372,380 (Tex. Crim. App. 1990, no pet). To show that the trial court abused its discretion when it refused to allow appellant to withdraw his plea, Ogbodiegwu must show that the trial court's ruling lies outside the zone of reasonable disagreement. Jagaroo, 180 S.W. 3d at 802.

Ogbodiegwu has failed to make such a showing. First, as we have explained, the record does not reflect that Ogbodiegwu's
plea was the result of anything other than a voluntary and intelligent choice. Ogbodiegwu admitted that he was informed of and understood the terms of the deferral and that he read the order before signing it. He also admitted that he knew he was not required to sign the agreement. thus, the municipal court would not have abused its discretion in finding that Ogbodiegwu was fully aware of the conditions and requirements of the agreement before he entered into it and should not have been allowed to withdraw his plea for that reason. See Jagaroo, 180 S. W. 3d at 803 (no abuse of discretion in denying motion to withdraw plea

when record reflects that defendant freely and voluntarily entered his plea).

Moreover, we observe that this was a Class C misdemeanor case, punishable by fine only, that had already been pending on the municipal court's docket for what the municipal court could have found was an inordinate amount of time. Ogbodiegwu's plea was not entered until March 2007, almost one year after formal charges were filed and almost two years after the City had first notified him that the car wash was in violation of the code. Several motions for continuance had already been filed and granted, and Ogbodiegwu's motion to withdraw his plea was filed three months into his six-month deferred disposition. The municipal court would not have abused its discretion in finding that the motion to withdraw was another attempt by Ogbodiegwu to further delay the final disposition of this case. See DeVary v. State, 615 S.W.2d739,740 (no abuse of discretion in denying motion to withdraw guilty plea when motion was filed six weeks after case was taken under advisement).

Furthermore, the only reason Obgodiegwu provided for wanting to withdraw his plea was that he did not know he had a legal defense to the charge prior to entering his plea. However, the municipal court would not have abused its discretion in concluding otherwise. In the motion to withdraw, counsel represented that the "legal, non-conforming use" defense had been raised to the City in a letter from Ogbodiegwu's prior counsel dated May 31, 2005, but that prior counsel had accepted the City's explanation that the defense did not apply in this case. Although this letter was not admitted into evidence, Ogbodiegwu acknowledged in his testimony that he had read the letter and was aware of its contents. Thus, the municipal court could have reasonably inferred that Ogbodiegwu knew about this defense prior to entering his plea but decided not to pursue it because he did not believe at the time he entered

his plea that it would succeed. The municipal court would not have abused its discretion in finding that it was now too late for Ogbodiegwu to change his mind about the viability of the defense, especially considering that the letter in which the defense was raised was written almost two years prior to Ogbodiegwu entering his plea.

Finally, Ogbodiegwu argues that he should have been allowed to withdraw his plea because the City breached the plea agreement by continuing to file charges against him after he filed his motion to withdraw. See Ex parte Williams, 637 S.W. 2d943,947-48 (Tex.Crim. App. 1982) (explaining contract theory of plea bargains and observing that "when a plea bargain is not kept, the proper relief is either specific enforcement of the agreement or withdrawal of the plea, depending upon the requirements of the circumstances in each case"). However, nowhere in the record or in the order deferring disposition is there any indication that the City was required by the agreement to refrain from filing further charges against Ogbodiegwu for ongoing violations[1]. The order did, however, require Ogbodiegwu to cease operating the car wash and, by his own admission, Ogbodiegwu resumed operating the car wash in summer 2007. Thus, the record reflects that Ogbodiegwu violated the plea agreement. On this record, we cannot conclude that the district court abused its discretion in denying Ogbodiegwu's motion to withdraw his plea. We overrule Ogbdiegwu's first issue.

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[1] Ogbodiegwu cites to internal city policies that apparently prohibit the City from bringing further charges against a person who has violated a code provision if that person has been placed on deferred adjudication for that violation. Whether or not the City violated these policies would have no bearing on whether the City violated the plea agreement.

CONCLUSION

We affirm the judgment of the county court at law.

_____

Bob Pemberton, Justice

Before Justices Patterson, Puryear and Pemberton

Affirmed

Filed: February 12, 2010

Do Not Publish

COURT OF APPEALS
THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

NO. 03-09-00443-CR

Ben Ogbodiegwu

v.

The State of Texas

(NO. C-1-CR-08-100115 IN THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY)

I, JEFFREY D. KYLE, CLERK OF THE THIRD COURT OF APPEALS OF THE STATE OF TEXAS, do hereby certify that the foregoing sixteen (16) pages contain a true and correct copy of the:

MEMORANDUM OPINION

Issued by said Court on February 12, 2010, in the above numbered and styled cause.

WITNESS MY HAND and seal of the COURT OF APPEALS for the the District of Texas, May 21, 2010

JEFFREY D. KYLE, CLERK

By:_____
Courtland Crocker, Deputy Clerk

NO. 03-09-00443-CR

IN THE COURT OF APPEALS THIRD DISTRICT OF TEXAS

BEN OGBODIEGWU

Appellant

v.

THE STATE OF TEXAS
Appellee
On appeal from

Travis County Court at Law #1
#C-1-CR-08-100115
Originally tried in the Municipal Court of Austin, Texas
#6233380

APPELLANT'S MOTION FOR REHEARING

WILLIE SCHMERLER
Texas Bar No. 17764700

SCANLAN, BUCKLE & YOUNG, P.C.
602 West 11th Street
Austin, Texas 78701
Telephone 512/472-1772
Facsimile 512/478/7750
Email: willie@sbylaw.com

ATTORNEY FOR APPELLANT

FILED
FEB 26 2010
Third Court of Appeals
Jeffrey D. Kyle, Clerk

NO. 03-09-00443-CR

BEN OGBODIEGWU, Appellant V. THE STATE OF TEXAS, Appellee IN THE COURT OF APPEALS THIRD DISTRICT OF TEXAS

MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

Now comes the Appellant and files his Motion for Rehearing, pursuant to TEX.R.APP.P.49.1, and would show the Court the following:

STATEMENT OF THE CASE

This was originally an appeal to county court from an order of the Municipal Court of Austin, Texas in cause #6233380 denying Appellant's Motion to Withdraw Plea and revoking the Deferred Disposition in a zoning violation case. That judgment was affirmed by the Travis County Court at Law #1 in cause #C-1-CR-08-100115 in an Opinion and Judgment filed July 2, 2009. Appellant pursued this further appeal because of errors of fact and law in the Opinion and Judgment of that court, as well as errors of law in the municipal court.

This Court affirmed the conviction on appeal. Ogbodiegwu v. State, No. 03-09-00443-CR, 2010-WL 522648 (Tex. App. – Austin delivered February 12, 2010, no pet.h.) (not designated for publication). This motion for rehearing is timely if filed by February 29, 2010, TEX.R.APP.P.4.1. and 49.1.

STATEMENT OF RELEVANT FACTS

Appellant is the executive director of a non-profit organization in Austin that provides transitional housing, treatment services, and job opportunities for the homeless and those coming out of jails and prisons. (CR 247). This case concerns an alleged zoning violation of a car wash operated by the non-profit. (CR 12; CR 246). Appellant testified at the hearing on the motion to withdraw the plea that his original counsel, Lucas Wilson and Kelly McDonald, never informed him that he had a valid legal defense to the zoning violation claim against him, even though Wilson and McDonald were Appellant's counsel for almost a year. (CR 256, 258).

Appellant testified that after original counsel continually pressured him not to come to court and induced him to spend $35,000 on a site plan that was not necessary, he decided to hire new counsel. (CR 109-110; CR, 251, 259). Jeffrey Howard, Appellant's subsequent counsel, filed a motion for continuance because he was only representing Appellant for a few days before a trial setting on March 26, 2007. (CR 124-127; CR 251-252). Appellant and the newly retained counsel appeared on the 26th and, confronted by what he thought was a choice of trial with no defense or a plea bargain for deferred disposition, he took the "deal" and entered a no contest plea. (CR 130-131; CR 251-252). At the time the plea was entered, Howard was not yet aware of the legal defense to the claim against Appellant. (CR 252). Upon discovering the legal defense, Howard soon thereafter filed a motion to withdraw the plea. (CR 151-161).

It has since become apparent from the Clerk's Record for this appeal that Howard's Motion for Continuance has in fact been granted on March 22, 2007 (CR 129) though Appellant was unaware of that fact (CR 252, 256). Appellant testified that at the time he entered his plea, he believed he had no legal defenses to the claim against him, and since his major concern was

to avoid having a criminal record, he entered a plea of no contest and received deferred disposition (CR 130-131; CR 256, 257) pursuant to Code of Criminal Procedure 45.051. Appellant testified that he did not pleas voluntarily because if he had known he had a legal defense at the time he entered a plea, he would not have pled no contest. (CR 255,256).

At the hearing on the motion to withdraw plea, the judge interrupted Appellant's counsel's direct examination of Appellant and prohibited him from proving there was a valid legal defense to the charge:

"Q: Can you describe a little bit about what your car wash –

JUDGE VITUCCI: Excuse me. What about your motion?

MR. ROCKWELL: Your Honor, a good deal of our motion is showing that we have a defense, showing what he is doing is legal.

JUDGE VITUCCI: I'm asking for evidence with regard to is plea in this matter.

MR. ROCKWELL: The plea –

JUDGE VITUCCI: The plea in this matter.

MR. ROCKWELL: I'll be glad to go into the attorney issue with you in this matter. Would you accept the evidence showing that we do have a valid defense, and that the operation is legal?

JUDGE VITUCCI: "No." (CR 249 line 20 to 250 line 5)

New charges for the same activity were filed against Appellant by the Appellee while the deferred disposition was pending and before it had been revoked. (CR 278). The new charges were

filed by the Appellee after Appellant filed his motion to withdraw plea but before the hearing on that motion. (CR 278-279). Appellee's lawyer admitted as much to the court below. (CR 282).

The court below denied Appellant's motion to withdraw plea and revoked the deferred disposition in this case. (CR 176).

Subsequently, the court signed a Judgment (CR 199). Appellant filed his motion for new trial (CR 201-211), presented it to the court (CR 223-224), and it was overruled. (CR 226). Appellant then sought relief by appeal to the Travis County Court at Law #1. By Opinion and Judgment filed July 2, 2009 in cause #C-1-CR-08-100115, that court affirmed the Judgment of the Austin Municipal Court. Appellant seeks review of decisions below. (CR 229-230, 383, 385). This Court by opinion dated February 12, 2010, affirmed the ruling of the county court at law.

GROUND FOR REHEARING

In ruling that Appellant's case had been taken under advisement by the time Appellant filed his motion to withdraw the plea (Opinion pp. 12-13), this Court relies upon a faulty premise and in so doing effectively concludes that a criminal defendant may NEVER withdraw his plea as a matter of right in municipal or justice court deferral.

A premise for this Court's opinion on page 12-13 that Appellant's case had been taken under advisement at the time he filed his motion to withdraw the plea is its assertion that deferred disposition is the municipal court equivalent of community supervision. (See Opinion, first sentence of the last paragraph on page 12.) There are neither statutes nor cases that indicate deferred disposition is the municipal court equivalent of community supervision. This Court cites Article 45.051, C.C.P., for that proposition. The article does not say that. Cases conclude that

the opposite is true. This Court has ruled that a successfully completed deferral on a class C misdemeanor in county court is not expungible, while a successfully completed deferral in municipal court (or peace justice court) is expungible. Retzlaff v. Bell County Attorney's Office, 03-98-00580-CV, 1999 WL 816175 (Tex.App. – Austin 1999, no pet.h.) (not designated for publication). A former judge of the Texas Court of Criminal Appeals agreed in Pickett v. State, No. 05-00-01128-CR,2002 WL 202466 (Tex.App. – Dallas 2002, no pet.h.) (not designated for publication). They are not, in fact, . The "court supervised probations" of community supervision in the county and district courts are often revoked upon motion by the State. That is never true during the deferral perios in Austin Municipal Court cases, except by mistake or agreement. In the instant case, all action – ALL action – was deferred at the time the parties and the judge signed the order of deferral. Appellant's request to withdraw his plea was made before the court took action to "dispose" of the case, and it was Appellant's right to withdraw the plea. This Court's logic establish that an individual may never withdraw his plea as a matter of right in any municipal or jp court, while he would have that right for class C cases in district or county courts.. Even if that were the intention of this Court, and I'm certain it is not, it has never before been the law.

PRAYER

As this case was not under advisement when the Appellant sought to withdraw his plea, Appellant asks this Court to rule that the trial court erred by not allowing Appellant to withdraw his plea as a matter of right.

Appellant prays that this Court grant his Motion for Rehearing, consider the merits of the claim raised, and reverse the disposition below and remained the cause.

Respectfully submitted,
WILLIE SCHMELER
Texas Bar No. 17764700
SCANLAN, BUCKLE & YOUNG, P.C.
602 West 11th Street
Austin, Texas 78701
Telephone 512/472-1772
Facsimile 512/478-7750
Email: willie@sbylaw.com
ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I, Willie Schmerler, do hereby certify that a true and correct copy of the foregoing document has been served on the following named attorney as indicated on this 26th day of February 2010:

Meitra Farhadi
Assistant Austin City Attorney
P.O. Box 1546
Austin, Texas 78768 Via Facsimile

_____

WILLIE SCHMERLER

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED FEBRUARY 12, 2010

NO. 03-09-00443-CR

Ben Ogbodiegwu, Appellant

v.

The State of Texas, Appellee

APPEAL FROM COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY BEFORE JUSTICES PATTERSON, PURYEAR, AND PEMBERTON AFFIRMED – OPINION BY JUSTICE PEMBERTON

THIS CAUSE came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the county court at law's judgment. IT IS THEREFORE considered, adjudged, and ordered that the judgment of the county court at law is in all things affirmed. It is FURTHER ordered that the appellant pay all costs relating to this appeal, both in this Court and the court below; and that this decision be certified below for observance.

ORDER MADE MARCH 22, 2010

OVERRULING APPELLANT'S MOTION FOR

REHEARING

I, Jeffrey D. Kyle, Clerk of the Court of Appeals for the Third District of Texas, at Austin, hereby certify that the foregoing page contains a true and correct copy of the JUDGMENT of said Court, the disposition of rehearing, and the respective dates thereof, in Cause No. 03-09-00443-CR, Ben Ogbodiegwu v. The State of Texas, on appeal from Travis County, Texas.

WITNESS MY HAND and seal
Of the COURT OF APPEALS
For the Third District of Texas,
May 21, 2010

JEFFREY D. KYLE, CLERK

_____

By Courtland Crocker, Deputy
Clerk

City of Austin
Date: May 10, 2010

Willie Schmerler
602 West 11th Street
Austin, Texas 78701-2099

Re: Municipal Court, City of Austin, Texas
Court Cause Number 6233380
Ben Ogbodiegwu

Dear Mr. Schmerler:

The referenced cause was appealed from the Municipal Court to the Texas Court of Appeals. The judgment record in the referenced cause was affirmed by the Texas Court of Appeals, Third District, County Court Cause Number 03-09-00443-CR.

The sum of the fine assessed and costs, as recorded in the judgment record of the referenced cause, and dated October 10, 2007, is in the amount of $2,000.00.

The cash bond you have on deposit with the Austin Municipal Court will be deducted from the amount owed leaving a balance of $500.00

Sincerely,

Lisa Munden
Deputy Clerk
Municipal Court
City of Austin, Travis County,
Texas

Ben Ogbodiegwu

Forwarded Message
From: Ben Ogbodiegwu ben 78664@yahoo.com
Chmerler willie@sbylaw.com
Sent: Thu, July 22, 2010 2:00:54 PM
Subject: Re: the first case

Dear Mr. Willie:
Could you please e-mail me or fax this letter from the Austin Municipal Court demanding payment of $500.00 when my case is still under appeal. I never made this payment or authorize anyone to make such a payment on my behalf. Thanks!

Ben Ogbodiegwu

From: Willie Schmerler willie@sbylaw.com
To: Ben Ogbodiegwu ben 78664@yahoo.com
Sent: Mon, May 17, 2010 12:24:31 PM
Subject: the first case

Ben:

I got this letter on Friday from the Austin Municipal County Clerk. They want $500, but I think their request is premature. Though I didn't get a copy of your PDR to the Texas Court of Criminal Appeals, I learned that you did file one. Until it is ruled on and final and a "mandate" issue, I believe your case is not final and you won't owe any money.

WILLIE SCHMERLER
Board Certified in Personal Injury Trial Law
Scanlan, Buckle & Young, P.C.www.sbylaw.com
602 West 11th Street
Austin, exas 78701
Telephone 512/472-1772
Facsimile 512/478-7750

The Voice of Austin
Austin Community Radio, Inc.
8906 Wall Street, Suite 203
Austin, Texas 78754
(512) 836-9544-(512) 836-1146 Fax

From : Steve Savage (General Manager)
Austin Community Radio, Inc. (KAZI 88.7 FM)

To: Mr Ben Ogbodiegwu
Push-Up Foundations, Inc.
1711 East Cesar Chavez
Austin, Texas 78702

Dear Mr. Ogbodiegwu:
I received your email about the Push-Up Foundations, Inc. advertisement is to stop airing. We have stopped the advertisement from playing as per your request.
We would like to thank you for your support and we also look forward too a continued relationship with you in the future.
Thank you again; we truly appreciate your financial support in our efforts to continue to be the "voice of Austin."

Sincerely,

Steve Savage
General Manager

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. PD.0609-10

BEN OGBODIEGWU, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD COURT OF APPEALS TRAVIS COUNTY

PER CURIAM, KEASLER AND HERVEY, J>J>, dissent.

ORDER

The petition for discretionary review violates Rule of Appellate Procedure 68.4(1) & 9.3(b), because it does not contain a copy of the opinion of the court of appeals and the original petition is not accompanied by 11 copies.
The petition is struck. See Rule of Appellate Procedure 08.6.
The petitioner may redraw the petition. The redrawn petition and copies must be filed in the Court of Criminal Appeals within thirty days after the date of this order.

Delivered: June 30, 2010
Do Not Publish

NO. PD-0609-10

THE COURT OF CRIMINAL APPEALS OF TEXAS

Ben Ogbodiegwu
Appelant

V.

THE STATE OF TEXAS
Appellee

On appeal from Travis County Court at Law # 1
C-1-CR-08-100115

Originally tried in the Municipal Court of Austin, Texas
#6233380

MOTION TO REDRAWN PTITION FOR DISCRETIONARY REVIEW

Ben Ogbodiegwu , Pro-Se
Appellant
P.O. Box 6312

Austin, Texas 78762-6312
Phone:512-786-7966
Fax:512-469-1788
Email: Ben78664@yahoo.com

MOTION FOR DISCRETIONARY REVIEW TO THE HONORABLE COURT OF APPEALS.

NOW comes the Appellant and files his Motion for Discretionary Review, pursuant to the Court of Criminal Appeals under Rule 68, Texas Rules of pursuant to the Court of Criminal Appeals under Rule 68, Texas Rules of Appellate Procedure, and in support; therefore, would show as follows:

1. Austin City Council Resolution of March 4, 1999
2. A Legal Non-Conforming Use
3. East Cesar Chavez Neighborhood Plan
4. Auditing, Monitoring And Monthly Financial Reports Submitted To The City of Austin

FACTS

The Austin City Council is the governing body of the City of Austin: the Council approves while the members of its staff can only recommend. For a resolution passed by the Council to be changed, the members of Staff are required to come back to the Council with a recommendation for the Council to vote on the change. The members of staff do not have the authority or power to change such a resolution by the Council without the Council's authorization, and a party involved should be informed about the said change in writing. That has not been the case with Push-Up, because no change has been made to the resolution of March 4, 1999, The Austin City Council voted and approved funding for Push-Up's self sufficiency and work development program on March 4, 1999. From 1999 to August 2007, the members of staff of the City of Austin repeatedly audited, monitored and received monthly financial reports from Push-Up

about its car wash. This, however, took place for almost (8) eight years till August 2007 that Push-Up funding was wrongly terminated for false alleged code violations which were cleared by the Law Department by its letter of October 24, 2007.
A legal non-conforming use is that use established prior to city annexation or before a neighborhood plan goes into effect (RR 21-11 to 21-15, 38-22 to 39-2). The Push-Up hand car wash has been in existence since 1999 before the adoption of East Cesar Chavez in 2000. Mr. Gavino Fernandez's affidavit showed that a car wash has been regularly operated at 1711 East Cesar Chavez the entire time Push-Up has been. It is the same kind of car wash that was there prior to Push-Up being there. Also be you informed that Push-Up currently has a temporary permit to operate the car wash. Never a time in this past eight years did the City of Austin raise any issue about our car wash. The City of Austin had numerous means to stop the car wash if it were an issue of concern to the City. (1) The City of Austin could have refused to re-issue a certificate of occupancy in 2005 to Push-Up Foundations, Inc. The City of Austin could as well have stopped from renewing our contract yearly, but it was not done until 2007. Why?

PRAYER

Appellant prays that this Court grant his Motion for Discretionary Review for the following facts of the law:

1. Austin City Council Approved And Funded Push-Up On March 4, 1999
2. Push-Up car wash is a legal non-conforming use
3. East Cesar Neighborhood Plan Was Passed in 2000, Push-Up's Car Wash started in 1999
4. Currently, Push-Up has a Temporary Permit from The City of Austin to operate the Car Wash
5. No Law Broken; No Conviction

The Appellant prays that this Court grant his Motion for Discretionary Review, consider the merits of the claim raised, and reverse the disposition below and remand the cause.

Respectfully submitted,

Ben Ogbodiegwu, Pro-Se
Appellant
P.O. Box 6312
Austin, Texas 78762-6312
Phone: 512-786-7966
Fax: 512-469-1788
E-mail: be78664@yahoo com

Official Notice From Court of Criminal Appeals of Texas P.O. Box 12308, Capitol Station, Austin, Texas 78711

Wednesday, August 25, 2010
Re: Case No. PD-0809-10
COA# 03-09-09443-CR
STYLE; OGBODIEGWU, BEN

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Louise Pearson, Clerk

CERTIFICATE OF SERVICE

I, Ben Ogbodiegwu, Appellant, do hereby certify that a true and correct copy of the foregoing document has been served on the following named attorney as indicated on this 6th day of May 2010.

Meitra Farhadi
Assistant Austin City Attorney
P.O. Box 1546
Austin, Texas 78768
Via facsimile

THE COURT OF CRIMINAL APPEALS OF TEXAS

BEN OGBODIEGWU
Appellant

v.

THE STATE OF TEXAS
Appellate

On appeal from Travis County Court at Law #1 #C-1-CR-08-100115

Originally tried in the Municipal Court of Austin, Texas #6233380

MOTION TO DISMISS

Ben Ogbodiegwu, Pro-Se
Appellant
P.O. Box 6312

Austin, Texas 78762-6312
Phone: 512-786-7966
Fax: 512-469-1788
Email: ben 78664@yahoo.com

MOTION TO DISMISS

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS NOW comes the appellant and files his Amended Motion for Discretionary Review, pursuant to the Court of Criminal Appeals under Rules 68, Texas Rules of Appellate Procedure, and in support; therefore, would show as follows:

THE MOOTNESS DOCTRINE - DISMISSAL REQUIRED WHEN CONTROVERSY BECOMES MOOT

"Dismissal required when controversy becomes moot. Neither the Texas Constitution nor the Texas Legislature has vested this Court with the authority to render advisory opinion. See Tex. Const. art 11,-1; also see Cam arena v. Tex. Employment Commission 754 S.W.2nd 149, 151 (Texas 1988).

"In the U.S. federal judicial system, a moot case must be dismissed, there being a constitutional limitation on the jurisdiction of the federal courts. The reason for this is that ARTICLE THREE OF THE UNITED STATES CONSTITUTION limits the jurisdiction of all federal courts to "cases and controversies".

FACTS

Cam arena v. Tex. Employment Commission
Speer v. Presbyterian Children Home
The State Bar of Texas v. Gomez

The Texas Supreme Court rules that for a court to have jurisdiction over a lawsuit, three major issues must be identified: a live controversy, justifiable, and standing. Thus, when a live controversy ceases to exist between the litigating parties due to events occurring after the trial court has rendered judgment, the decision of an appellant court would be a mere academic exercise, and the court may not rule on the appeal. See Olson v. Comm'n for Lawyer Discipline, 901 S.W.2d520,522(Tex.App.-El Paso 1995,no writ).

Consequently, if a judgment shall not have a practical effect on the existing controversy, the appeal court is required to vacate the judgment of the trial court and dismiss the case.

The Appellant has obtained the permanent permit for his car wash through the City of Austin Watershed Department by meeting all the City code requirements. The Austin Watershed Department by meeting all the City code requirements. The Austin Planning Commission on May 11, 2010, approved the permit for Push-Up Foundations, Inc. on consent with a unanimous vote. However, if ever an appeal occurs, the appeal will be against the decision of the City of Austin. Push-Up has been cleared and approved by the City of Austin. Therefore, the case is moot. There is no longer a live controversy in this matter.

V. Prayer

As demonstrated above, Article II, Section I of the Texas Constitution prohibits advisory opinions; obviously by law, the court is required to vacate the judgment of the trial court and dismiss the case. Also, when a federal court's determination of a legal issue is no longer necessary to compel the result of originally sought, the case is moot and federal courts lack the power to hear it. The constitutional basis of the mootness doctrine is found in Article III of the U.S.CONSTITUTION which requires the existence of a case or controversy. Thus, a real and live controversy must exist at every stage of review. Push-Up met the entire City code requirement. The permit was approved on May 11, 2010 on consent by a unanimous vote. The car wash is now in a full operation; there is no more a live controversy between the parties. The court by law must vacate the judgment of the trial court and dismiss the underlying cause of action.

RESPECTFULLY SUBMITTED,

BEN OGBODIEGWU, PRO-SE
P.O. BOX 6312
AUSTIN, TEXAS 78762-6312
PHONE: 512-786-7966

I, Ben Ogbodiegwu, Appellant, do hereby certify that a true and correct copy of the foregoing document has been served on the following named attorney as indicated on this June 7, 2010:

Meitra Farhadi
Assistant Austin City Attorney
P.O. Box 1546
Austin, Texas 78768
Via facsimile

App. 61

NO PD-0609-10

THE COURT CRIMINAL APPEALS OF TEXAS

BEN OGBODIEGWU, Appellant

v.

THE STATE OF TEXAS

On appeal from Travis County Court at Law # 1
#C-1-CR-08-100115

MOTION TO REDRAW PETITION FOR DISCRETIONARY REVIEW

NOW, Come the appellant and files his MOTION TO REDRAWN PETITION FOR DISCRETIONARY REVIEW, pursuant to the Court of Criminal Appeals under rules 68, Texas Rules of appellate procedure, and in support: therefore would show as follows:
The Appellant asks the court to hear this case due to following reasons:

PLANNING COMISSION ACTION

A conditional use permit was approved by consent by the Planning Commission on May 11, 2010 (8-0). There is no longer a live controversy between the Appellant and Appellee. The following cases below show that when a case ceases to have a live controversy the criminal court must vacate the judgment and dismiss the case:

Valley Baptist Med. v. Gonzales

Cam arena v. Tex. Employment Comm'n

Oslo v. Comm'n for Lawyer Discipline

City of Dallas, Appellant v. Paul C. Woodfield, Appelle

Thomas j. "Jim " TRULOCK, Appellant V. The City of DUNCANVILLE, Appellee

Williams V. Laura
Murphy V. Hunt
An appellate court is prohibited from deciding a moot controversy by the separation of powers doctrine in the state and federal constitutions that prohibits court from rendering advisory opinions.
For an Appellee to have standing, a controversy must exist between the parties at every stage of the legal proceedings, including the appeal

PRAYER

The City of Austin Planning Commission ACTION: A conditional use permit was approved by consent by the Planning Commission on May 11, 2010 (8-0). All compatibility standards are met. The site plan complies with all requirements of the Land Development Code. There is no longer a live controversy between the Appellant and Appellee. Movant asks this court to hear this case.

RESPECTFULLY SUBMITTED,
BEN OGBODIEGWU, PRO-SE
P.O. BOX 6312
AUSTIN , TEXAS 78762-6312
PHONE:512-786-7966
Faz:512-469-1788

I , Ben Ogbodiegwu , Appellant , do hereby certify that a true and correct copy of the foregoing document has been served on the following named attorney as indicated on this July 20 , 2010:

Meitra Farhadi
Assistant Austin City Attorney

Austin , Texas 78768
Via facsimile
Page No.3

PLANNING COMMISSION SITE PLAN CONDITIONAL USE PERMIT APPEAL TO COUNCIL REVIEW SHEET

CASE NUMBER: SPC-2010-0033A

COUNSEL HEARING DATE: August 19, 2010

ADDRESS: 1711 E. Cesar Chavez

SITE AREA: 19,598 square feet (.449)

NEIGHBORHOOD PLAN: East Ceasr Chavez

APPLICANT: Push Up Foundation (Ben Ogbodiegwu) 1711 E. Cesar Chavez
Austin , Tx 78702

AGENT: Conley Engineering Inc. (Carl Conley)
1301 S. Capital of TX Hwy , Unit A 230
Austin , TX 78746

CASE MANAGER: Nikki Hoelter Phone: 974-2863
Nikki.hoelter@ci.austin.tx.us

PROPOSED DEVELOPMENT:
The applicant is requesting a conditional use permit for an automotive washing use to an existing transitional housing and treatment site. The automotive washing will be a hand car wash : however the Land Development Code does not distinguish an automatic car wash.

No modification to the building or impervious cover is associated with this site plan/change of use : the existing building and parking will be utilized . The owner does intend to provide a containment berm , sediment trap , and sump pump to dispose of the waste water from the car wash.

EXISTING ZONING: The proposed automotive washing use is located within an existing site that is currently used for transitional housing. The lot is zoned CS-MU-CO-NP and CS-1-MU-CO-NP. Ordinance No. 001214-20 established the zoning and conditional overlay for the site for the East Ceasar Chavez Neighborhood Plan , which provided that automotive washing of any type is a conditional use within the CS and CS-1 zoning districts.

SUMMARY STAFF RECOMMENDATION:
Staff recommends denial of the appeal and upholding Planning Commission approval of the conditional use permit. The site plan complies with all requirements of the Land Development Code

PlANNING COMMISION ACTION:
A conditional use permit was approved by consent by the Planning Commission on May11, 2010 (8-0)

NO. PD-0609-10

THE COURT OF CRIMINAL APPEALS OF TEXAS

BEN OGBODIEGWU, Appellant

v.

THE STATE OF TEXAS, Appellee

On appeal from Travis county court at law #1
C-1-CR-08-100115

Originally tried in the Municipal Court of Austin, Texas #6233380

SECOND SUPPLEMENTAL MOTION

Ben Ogbodiegwu , Pro - se
Appellant
P.O. Box 6312

Austin , Texas 78762-6312
Phone:512-786-7966
Fax:512-469-1788
Email:ben78664@yahoo.com

FILED IN COURT OF CRIMINAL APPEALS
AUGUST 24, 2010
LOUISE PEARSON,CLERK

SECOND SUPPLEMENTAL MOTION:

TO THE HONORABLE IN THE COURT OF CRIMINAL APPEALS OF TEXAS
NOW comes the appellant and files his SECOND SUPPLEMENTAL MOTION, pursuant to the Court of Criminal Appeals under rules 68, Texas Rules of Appellate Procedure, and in support: therefore would show as follows:

The Austin City Council on August 19, 2010 , voted (4-3) to deny the approved conditional use permit by the Planning Commission on May 11 , 2010 on (8-0) votes . Push – Up will comply with the said resolution of the Austin City Council, and shall not appeal its resolution. We ask the court to vacate the judgment and dismiss the case because there is no longer a live controversy exists between the parties. Please not, that Push-Up has withdrawn its advertisement from KAZI 88.7 on 1711 East Cesar Chavez concerning the car wash. See App. 43.

PRAYER

The issue before the court is whether there is a live controversy or not. The City of Austin has a pattern of changing the City ordinance code whenever we met the requirements. The staff and Austin Planning commission concluded: All compatibility standards are met. The site plan met all requirements of the Land Development Code. Yet, the Austin City Council voted against the ruling of the Austin Planning Commission as well as the recommendation of the staff. An appellate court is prohibited from deciding a moot controversy by separation of powers doctrine in the state and federal constitutions that prohibits court from rendering advisory opinions. For an appellee to have stand, a controversy must exist between the parties at every stage of the legal proceedings,

including the appeal, Push-Up has accepted the ruling of the Austin City Council, and stopped the car wash operation, withdrew its advertisement from the KAZI 88.7 and shall not appeal the decision of the Austin City Council. Therefore, there is no longer a live controversy between the Appellant and the Appellee. Movant asks the court to vacate the judgment and dismiss the case.

RESPECTFULLY SUBMITTED,

BEN OGBODIEGWU, PRO-SE
P.O. BOX 6312
AUSTIN, TEXAS 78762-6312
PHONE: 512-786-7966
FAX: 512-524-4854

I, Ben Ogbodiegwu, Appellant, do hereby certify that a true and correct copy of the foregoing document has been served on the following named attorney as indicated on this August 24, 2010:

Meitra Farhadi

Assistant Austin City Attorney
P.O. Box 1546
Austin, Texas 78768
Via facsimile
Page No. 3

NO. PD-0609-10

THE COURT OF CRIMINAL APPEALS OF TEXAS

BEN OGBODIEGWU
APPELLANT

V.

THE STATE OF TEXAS
-APPELLEE

On appeal from Travis County Court at Law # 1

#C-1-CR-08-100115

Originally tried in the municipal Court of Austin, Texas #6233380

SUPPLEMENTAL MOTION

Ben Ogbodiegwu , Pro - se
Appellant
P.O. Box 6312

Austin , Texas 78762-6312
Phone:512-786-7966
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Email:ben78664@yahoo.com

SUPPLEMENTAL MOTION

TO THE HONORABLE IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOW comes the appellant and files his SUPPLEMENTAL MOTION , pursuant to the Court of Criminal Appeals under rules 68 , Texas rules of Appellate procedure , and in support : therefore would show as follows: The Appellant asks the court to hear this case due to the following reasons: TAMPERING WITH A GOVERNMENT RECORD

A person commits the offence of tampering with a government record if: (b) The person knowingly presents or uses a written instrument which is or purports to be a government record or a true copy thereof , knowing that it has falsely been made , completed , or altered , or that a false entry has been made therein , with intent that it be taken as genuine.

PROSECUTORIAL CONDUCT

Falsified evidence, forged evidence or tainted evidence is information that has been created or obtained illegally, to sway the verdict in a court case. United States v. Berger (295 U.S. 78 (1935) . On May 10, 2010 , the prosecutor violated my constitutional right when he paid the fine from the money deposited for the bond without my authorization. The position of the prosecutor by paying this fine automatically influenced the decision of the Appeal court. The Court stated in the PDR that everything is in the file to justify its ruling against me. However, the issue in this case was never addressed by the court, which is whether there is a live controversy or not. The PDR from the court was never signed, which raised some serious questions since this is a legal document from the court. Please see the said exhibits: City of

Austin letter of May 11, 2010 to my former attorney , Mr. Willie Shmeller , who did nothing about this serious issue.

PRAYER

The issue before the court is whether there is a live controversy or not . The appellant did not pay any fine on this matter and would ask the court to vacate the judgment and dismiss the case because the case is moot.

RESPECTFULLY SUBMITTED,
BEN OGBODIEGWU, PRO-SE
P.O. BOX 6312
AUSTIN , TEXAS 78762-6312
PHONE:512-786-7966
Faz:512-469-1788

I, Ben Ogbodiegwu , Appellant , do hereby certify that a true and correct copy of the foregoing document has been served on the following named attorney as indicated on this July 27 , 2010:
Meitra Farhadi
Assistant Austin City Attorney
P.O. Box 1546
Austin, Texas 78768
Via facsimile

NO.PD-0609-10

THE COURT OF CRIMINAL APPEALS OF TEXAS

BEN OGBODIEGWU
APPELLANT

VS

THE STATE OF TEXAS
Appellee

On Appeal from
Travis County Court at Law #1
#C-1-CR-08-100115

Originally tried in the Municipal Court of Austin, Texas # 6233380

MOTION FOR REHEARING

Ben Ogbodiegwu, Pro - se
Appellant
P.O. Box 6312

Austin , Texas 78762-6312
Phone:512-786-7966
Fax:512-469-1788
Email:ben78664@yahoo.com

MOTION FOR REHEARING

TO THE HONORABLE IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOW Comes the appellant and Files his MOTION FOR HEARING, pursuant to the Court of Criminal appeals under rules 68 , Texas Rules of Appellate Procedure , and in support , therefore would show as follows:
The Austin City Council on August 19 , 2010 , voted (4-3) to deny the approved conditional use permit by the planning commission on May 11 , 2010 on (8-0) votes .Push- Up will comply with the said resolution of the Austin City Council , and shall not appeal . We ask the court to consider our motion for rehearing.

PRAYER

The issue before the court is whether there is live controversy or not. An appellate court is prohibited from deciding a moot controversy by separation of powers doctrine in the state and federal constitutions that prohibits court from rendering advisory opinions. For an appellee to have standing, a controversy must exist between the parties at every stage of the legal proceedings, including the appeal. The car wash has been stopped effective August 19, 2010.

RESPECTFULLY SUBMITTED,
BEN OGBODIEGWU, PRO-SE
P.O. BOX 6312
AUSTIN , TEXAS 78762-6312
PHONE:512-786-7966
Faz: 512-469-1788

I, Ben Ogbodiegwu, Appellant, do hereby certify that a true and correct copy of the foregoing document has been

Meitra Farhadı
Assistant Austin City Attorney
P.O. Box 1546
Austin , Texas 78768
Via facsimile
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Official Notice From Court of Criminal Appeals of Texas P.O. Box 12308, Capitol Station, Austin, Texas 78711

Wednesday, September 01, 2010
Re: Case No. PD-0609-10
COA# 03-09-00443-CR
STYLE; OGBODIEGWU, BEN

On this day, the Appellant's Pro Se motion for rehearing was rejected for non-compliance with Rule 78.2(c) T.R.A.P.

Louise Pearson, Clerk

Court of Appeals

THIRD DISTRICT OF TEXAS

October 22, 2010

The Honorable Dana DeBeauvoir
County Clerk
Travis County Courthouse
P.O. Box 149325
Austin , TX 78714

RE: Court of Appeals Number: 03-09-00443-CR
Trial Court Case Number: C-1-CR-08-100115

Style : Ben Ogbodiegwu
v.
The State of Texas

Dear Ms.DeBeauvoir:

Enclosed, with reference to the above cause, is the mandate of this court. Please file and execute in the usual manner.

Please note that, because the appeal has been affirmed the judgment of the trial court is in full force and effect and appropriate enforcement procedures may need to be instituted in your office, including issuance of a capias. If a capias is issued, please remind the sheriff that Texas Rules of APPELLATE Procedures 51.2(b)(3) requires that this court be notified when the mandate has been carried out and executed.
Your cooperation in this regard is appreciated.

Very Truly Yours,

Cc: Mr. Willie Schmerler
Meitra Farhadi
Ben Ogbodiegwu

MANDATE

THE STATE OF TEXAS

TO THE COUNTY COURT AT LAW NO.1 OF TRAVIS COUNTY , GREETINGS :

Trial Court Cause No. C-1-CR-08-100115

Before our Court of Appeals for the third district of Texas on February 12, 2010, the cause on appeal to revise or reverse your judgment between

Ben Ogbodiegwu
No. 03-09-00443-CR

V.

The State of Texas

Was determined, and therein our Court of Appeals made its order in these words

THIS CAUSE came on to be heard on the record of the court below , and the same being considered , because it is the opinion of this court that there was no error in the county court at laws judgment: IT IS THEREFORE considered , adjudged and ordered that the judgment of the county court at law is in all things affirmed. It is FURTHER ordered that the appellant pay all costs relating to this appeal, both in this court and the court below for observance.

Wherefore, we command you to observe the order of our court of Appeals in this behalf and in all things

Witness the Honorable J. Woodfin Jones, Chief Justice of the court Appeals for the Third District of Texas, with the seal of the Court affixed in the City of Austin on October 22, 2010

By:_____

Coutland Crocker